

[1]

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

S.B. CIVIL FIRST APPEAL NO.200/2004

Laxman Singh Vs. Himmat Singh & Others

Against judgment and decree dated
11.03.2004 passed by District Judge
Pratapgarh in Civil Original Suit No.
07/1997 - Laxman Singh Vs. Himmat Singh
& Ors.

DATE OF JUDGMENT: 27th March 2006.

PRESENT

HON'BLE MR.JUSTICE SATYA PRAKASH PATHAK

Mr. Rakesh Arora for appellant
Mr. Rameshwar Chauhan for respondent No.1
Ms. Shalini for respondent No.2 & 4.

BY THE COURT:

The present case reflects a sad state
of affair involving fight mainly between the
real brothers, who are the sons of erstwhile
Jagirdar of Badi Sadri.

The facts relating to the properties, which are subject matter of the suit are voluminous, but I am concentrating only on essential facts to the extent relevant for appreciating the legal issues arising for decision of this case. The parties, for the sake of convenience, have been referred as original parties.

The suit filed by plaintiff Laxman Singh, the appellant herein, for partition of ancestral and joint properties, declaration and permanent injunction, stated that the plaintiff and defendants No.1 to 3 are the real brothers, whose father Jagirdar Kalyan Singh expired on 8.12.1944 when they were minor and their mother expired on 20.04.1995. It was further stated that the properties mentioned in the lists attached with the suit came in ownership of their father from ancestors and as at the time of death of their father they were minor the Mewar State appointed Court of Ward in the year 1945 and same continued till coming into force

of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952 and they being the legal heirs of Joint Hindu Family have equal share in the properties. A reference of Will executed on 19.01.1994 by their mother in favour of defendant No.4, who is wife of plaintiff, in respect of the property in her possession was also made and it was averred that on the basis of that Will defendant No.4 is the only owner of the property described in the Will. In the prayer clause, the plaintiff prayed for decreeing the suit for partition of the moveable and immovable properties and also for permanent injunction against defendant No.1 restraining him from transferring or alienating the properties.

After notice of suit, the defendants filed written statements. The defendant No.1 pleaded that he being the eldest son in the family became Jagirdar and denied that the properties in question to be of Joint Hindu Family. Defendant No.1 also took objection

[4]

that the trial Court was not having jurisdiction to try the suit in view of Sec.46 of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952.

On the basis of pleadings of parties, the trial Court framed issues as under:

1. Whether the properties listed in Schedule 'A' & 'B' attached to the plaint are of undivided Hindu Joint Family and the plaintiff is entitled to $\frac{1}{4}$ share of it?
2. Whether as per Sec.46 of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952 the plaintiff has no right to challenge the matter and therefore the Court has no jurisdiction to hear this case?
3. Whether the plaintiff has paid less court fees on the plaint and on this ground the suit is liable to be rejected?
4. Relief?

The trial Court dealt with the matter in detail on Issue No.2 and referring to the bar of jurisdiction provided under Sec.46 of the Rajasthan Land Reforms and Resumption of

[5]

Jagirs Act, 1952, which starts with "save as otherwise provided in this Act, no Civil or Revenue Court shall have jurisdiction in respect of any matter which is required to be settled, decided or dealt with by any officer or authority under this Act", ultimately dismissed the suit stating that the plaintiff, defendant No.2 & 3 have been given their shares by gifting them assets and observed that in relation to the properties with Himmat Singh the then constituted competent authority Jagir Commissioner by his decision dated 25.10.62 had found the properties mentioned in Schedule 'A' & 'B' to be the personal properties of defendant No.1.

I have heard learned counsel for the parties.

The contention of the learned counsel for the appellant is that the trial Court has committed grossest error of law while deciding Issue No.2 and holding that the suit was not

maintainable in the civil Court. It was also contended that in view of the provisions of Sec.9, 21, 22 & 23 of the Act it will be clear that the subject matter of the suit was triable by the civil Court only. It has also been contended that as regard partition of a Hindu Undivided Family is concerned, the suit will lie in the civil Court. In the last, it has been contended that the trial Court in fact has not properly appreciated the legal provisions of the Act of 1952.

On the other hand, learned counsel for the respondent has supported the judgment passed by the learned trial Court. It was also argued that in view of Sec.46 of the Act, the suit was not triable by the civil courts. It was also submitted that the plaintiff had no right in the suit property at all for the reason that the defendant being the eldest son of Late Kalyan Singh the Ex.Jagirdar of the State and according to the customs prevailing, the other brothers were only entitled upto the extent of maintenance.

I have considered the submissions made before me.

The point, which requires consideration in the present matter, is as to whether in view of provisions contained in Sec.46 of the Land Reforms & Resumption of Jagirs Act, 1952 (to be referred hereinafter as the 'Act of 1952'), the present suit was not maintainable in the trial Court?

First of all, the law on the subject may be seen.

In Komammal Vs. Annadana Jayada Gounder (AIR 1928 PC 68), their Lordships of the Privy Council in relation to a litigation concerned with the right of succession of China Tiruppadati Hill Poliem on an appeal being filed, held as under:

"Impartible estates are the creatures of custom, and where no specific custom is proved, the customary law of succession

applies with such qualifications only as flow from the impartible nature of the subject, and consequently for purpose of succession, an impartible estate must be considered joint family property unless it were shown to be separate, and in order to establish that an impartible estate has ceased to be joint family property for the purpose of succession, it is necessary to prove an intention expressed or implied on behalf of the other members of the family to give up their chance of succession to the impartible estate.

In Shiba Prasad Singh Vs. Rani Prayag Kumari (AIR 1932 PC 216), it was observed as under:

"The keynote of the whole position, in their Lordships' view, is to be found in the following passage in the judgment in Tipperah case (1869) 12 M.I.A. 523:-

"Where a custom is proved to exist, it supersedes the general law, which, however still regulates all beyond the custom."

Impartiality is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have; (1) the right of partition; (2) the right to restrain alienations

by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Satraj Kuari's case* (1889 10 All. 272) and *Eama Krishna Vs. Venkata Kumara* (1889 22 Mad. 383 - 26 I.A. 83 P.C.), and so also the third as held in *Gangadhara Vs. Rajah of Pittapur* (AIR 1918 PC.81). To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right therefore still remains, and this is what was held in *Baijnath's case* (AIR 1921 PC 62). To this extent the estate still retains its character of joint family property, and its devolution is governed by the Mitakshara law applicable to such property. Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birthright of the senior member to take by survivorship still remains. Nor is this right a mere spes successus similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered. Such being their Lordship's view, it

follows that in order to establish that a family governed by the Matakshara in which there is an ancestral impartible estate has ceased to be joint, it is necessary to prove an intention, express or implied on the part of the junior members of the family to renounce their right of succession to the estate. It is not sufficient to show a separation merely in food and worship. Admittedly there is no evidence in this case of any such intention. The plaintiff's therefore have failed to prove separation, and the defendnat is entitled to succeed to the impartible estate. Being entitled to the improvements on the estate, being the immovable properties specified in items 9 to 19 Sch. Kha. These improvements, in fact, form part of the impartible estate."

In Thakur Gopal Singh Vs. Commissioner of Wealth Tax (1973 RLW 231), this Court while deciding a case relating to determination of surplus land under the Ceiling law, observed

"In the circumstances, it cannot therefore be said that a Jagirdar in the State of Udaipur had the absolute domain over the estate and he held the same without any strings. The fact that the property is ancestral and its succession is governed by the rule of primogeniture does not mean

that the estate is not capable of being the joint family property. As noticed above, the Jagirdar is bound to maintain and defray the reasonable expenses of the junior members of the family from the Jagir.

In Gopal Singh Vs. State of Rajasthan (1983 RLW 475), this Court while considering the provisions of Tenancy Act and the provisions of Jagir Act held that rule of primogeniture not applicable after resumption of Jagirs because it becomes joint family property and the members of joint family are therefore entitled to seek partition. In Para 11 of the judgment, it has been observed as under:

"Thus, if the impartible character of the property was lost on account of the resumption of jagir, then the property would still bear the character of a joint family property. A similar matter was considered by a division bench of this Court in Thakur Gopal Singh of Badnor Vs. Commissioner of Wealth Tax, Rajasthan, Jaipur (1973 WLN 14), wherein a question about the nature and character of the compensation received by the ex-Jagirdar upon the abolition and resumption of his Jagir arose for

consideration. Their Lordships held that the Jagir was hereditary and ancestral property and the Junior members of the family had acquired their rights and interest by birth although only the right of succession by survivorship could be exercised, on account of the impartible nature of the Jagir. But as the Jagir was not the absolute property of the Jagirdar, it was a joint family property governed by the rule of primogeniture which belonged to the Hindu undivided family of the Jagirdar and when the Jagir was resumed the compensation awarded in respect of such joint family property was not separate property of the ex-Jagirdar but was joint family property, because the character of the compensation could not be different from that of the Jagir itself, in lieu of resumption of which the same was paid. The khudasht land, which the ex-Jagirdar was allowed to retain on the resumption of his Jagir and in which he acquired Khatedari rights under Sec. 13 of the Rajasthan Tenancy Act, on the abolition and resumption of Jagir, must bear the same character as that of the Jagir, namely that the said land was joint family property in the hands of the ex-Jagirdar. The Board of Revenue observed that there was nothing on the record to show that the petitioner's family was a joint Hindu family. I am unable to agree with the view taken by the learned member of the Board of Revenue in this respect. The very fact that the Jagir was an ancestral property and the

Jagirdar was holding the Jagir as property of the Hindu undivided family, with a rider that the members of the family could not get a partition effected because of the fact that by custom the Jagir property was impartible in nature and was governed by the rule of primogeniture. However, since the Jagir was resumed, the impartible character of the property was lost and the joint family property became subject to partition. So the co-sharers could exercise other rights as coparceners in the joint family property. The khudkasht land held by the Jagirdar must, therefore, be held by him on behalf of and for the benefit of the joint Hindu family, of which he was the karta and although the ex-jagirdar became the khatedar tenant in respect of such Khudkasht land, yet the Khatedari rights were held by him on behalf of the joint Hindu family of which he was the Karta. The Junior members of the family were entitled to seek partition of the joint family property, namely the khudkasht land held in the name of Gopal Singh."

In State of U.P. Vs. Raj Kumar Rukmini Ram Brahma (AIR 1971 SC 1687), it has been observed that an estate which is impartible by custom cannot be said to be the separate or

exclusive property of the holder of the estate and if the holder has got the estate as an ancestral estate and he has succeeded to it by primogeniture it will be part of the Joint Estate of the undivided Hindu family.

To decide the controversy, for convenience, relevant Sections 9, 21, 22, 23 & 46 of the Act of 1956 are reproduced below:

9. Khatedari rights in jagir lands.- Every tenant in a jagir land who at the commencement of this Act is entered in the revenue records as a Khatedar, pattedar, khademdar or under any other description implying that the tenant has heritable and full transferable rights in the tenancy shall continue to have such rights and shall be called a khatedar tenant in respect of such land.

21. Resumption of jagir lands.-
(1) as soon as may be after the commencement of this Act, the Government may, by notification in the Rajasthan Gazette, appoint a date for the resumption of any class of jagir lands and different dates may be appointed for different classes of jagir lands.

(2) The Government may, by notification in the Rajasthan Gazette, vary any date appointed

under this section at any time before such date.

(3) The date finally appointed under this section in relation to the resumption of any jagir lands is hereinafter referred to as the 'date of resumption' of those jagir lands.

22. Consequences of resumption.-

(1) As from the date of resumption of any jagir lands notwithstanding anything contained in any existing jagir law applicable thereto but save as otherwise provided in this Act,-

(a) the right, title and interest of jagirdar and of every other person claiming through him in his jagir lands, including forests, trees, fisheries, wells, tanks, ponds, water channels, ferries, pathways, village sites, hats, bazaars and mela grounds and mines and minerals whether being worked or not, shall stand resumed to the Government free from all encumbrances;

(b) all rights, title and interests created in or over the jagir by the jagirdar or his predecessor-in-interest shall, as against the Government, cease and determine;

(c) all rents and cesses in respect of any holdings (including any land leased by or on behalf of the jagirdar for any purpose other than agriculture) in the jagir land for any period after the date

of resumption which, but for such resumption, would have been payable to the jagirdar, shall be payable to the Government;

(d) all revenue rents, cesses or other dues for the agricultural year in which the date of resumption falls, recovered by the jagirdar before the said date or by the Government after the said date, shall, after deducting therefrom the expenses of collection at the rate of 7 percent be ratably distributed between the jagirdar and the Government, the amount to be distributed bearing to the total amount recovered during the agricultural year the same proportion which the period before the date of resumption or, as the case may be, the period after the said date, bears to the whole of the agricultural year;

(e) all arrears of revenue, cesses or other dues in respect of any jagir land due from the jagirdar for any period prior to the date of resumption including any sum due from him under clause (d) and all loans advanced by the Government or the Court of Wards to the jagirdar shall continue to be recoverable from such jagirdar;

(f) the Government shall cease to be liable to pay to the jagirdar any cash payment in respect of his rights as such jagirdar;

(g) the right, title and interest of the jagirdar in all buildings, on jagir lands used for schools and hospitals not within

residential compounds shall stand extinguished and such buildings shall be deemed to have been transferred to the Government;

(h) the right, title and interest of the jagirdar or any other person in the jagir land resumed under clause (a) shall not be liable to attachment or sale in execution of any decree or other process of any court, civil, or revenue and any attachment existing on the date of resumption or any order for attachment passed before such date shall cease to be in force;

(i) the jagirdar shall cease to be liable to pay and shall not be required to pay to the Government in respect of any jagir land resumed under this Act, any tribute or land revenue payable by him under any existing jagir law or under this Act.

(2) Nothing contained in this section shall -

(a) render the government liable for the payment of debts incurred by the jagirdar and the jagirdar shall be personally liable for the payment of all such debts;

(b) operate as a bar to the recovery, through the Collector as an arrear of land revenue by the Jagirdar of any sum which is legally due (subject to the deduction of collection charges at the rate of 7%) to him by virtue of this rights in the jagir land in respect of any period prior to the

commencement of the agricultural year in which the date of resumption falls;

(c) preclude the Government from remitting wholly or in part any loans advanced to the jagirdar by the Government and utilized by the jagirdar for the economic or agricultural development of his jagir lands other than khudkasht lands:

Provided that where a tenant disputes the Jagirdar's claim for the dues mentioned in clause (b) the jagirdar shall be required to file a suit for such dues according to law.

23. Private lands, buildings, wells, house, sites and enclosures.- (1) Notwithstanding anything contained in the last preceding section-

(a) Khudkasht lands of a Jagirdar;

(b) (i) all open enclosures used for agricultural or domestic purposes and in his continuous possession(which including possession of any predecessor-in-interest) for six years immediately before the date of resumption;

(ii)x x x

(iii) all private buildings, places of worship, and wells situated in, and trees standing on lands, included in such enclosures or house-sites, as

are specified in clause (i) above, or land appertaining to such buildings or places of worship;

(c) all groves and fruit trees wherever situate, belonging to or held by the jagirdar or any other person;

(d) all tanks in the personal occupation of the Jagirdar and not used for irrigating the lands of any tenant in the jagir land;

shall continue to belong to or be held by such jagirdar or other person;

Provided that nothing contained in clause (d) shall affect the rights of the jagirdar in any portion of a tank which may be in the personal cultivation of the jagirdar.

(2) If any question arises whether any property is of the nature referred to in sub-section (1), it shall be referred to the Jagir Commissioner, who may, after holding the prescribed enquiry, make such order thereon as he deems fit.

46. Bar of jurisdiction.-(1)

Save as otherwise provided in this Act, no Civil or Revenue Court shall have jurisdiction in respect of any matter which is required to be settled, decided or dealt with by any officer or authority under the Act.

(2) No order made by any such

officer or authority under this Act shall be called in question in any Court.

From a bare perusal of the above provisions read with the preamble of the Act of 1952, it appears that the Act was enacted for imparting justice in relation to Jagir lands and disbursement of the same between the claimants which the Jagirdars were earlier enjoying. It also appears that the purpose of the Act was that the land should go to the tillers who were actually holding possession over the land and were farmers. Sec.2 (h) defines 'Jagir land' as the land in relation to which a Jagirdar has right in respect of land revenue and other kind of land revenue. 'Jagirdar' has been defined as a person holding grant of jagir from the Rulers of covenanting State which could in no case include his personal property and other lands not falling within the definition of 'Jagir' to which he was not paying or not liable to pay land

revenue. Thus, it appears that the scheme under the Act suggests that it was only in relation to the land in respect of which land revenue was collected or was liable to be collected from the actual tiller. Sec. 9, 21, 22 & 23 clearly go to show that Khatedari of the land was to vest in the persons who were actual tillers of the lands. Sec.23 of the Act when perused, it appears that it provides that all open enclosures and houses and buildings which included Mahals, Havelis and residential houses including all private houses, all private buildings, places of worship shall continue to belong and to be held by the Jagirdars. It further appears that on above aspects Jagir Commissioner as per sub-sec.(2) of Sec.23 was authorized to hold enquiry and thereafter to make proper orders. Thus, it appears that Hindu Undivided family of Ex-Jagirdar was not at all interfered with under the provisions of the Act of 1952. It further appears that as regards the residential and other properties of Ex-Jagirdar, the Act of

1952 did not touch them as appears from the provisions contained in Sec.23 of the Act. Thus, it appears that as far as Hindu Undivided Family property is concerned, that was not made the subject matter of the Act of 1952.

After carefully examining the above provisions and case law, a glance on the facts stated in the plaint, transpires that the dispute infact is not connected to the status of the Jagirdar but infact is in relation to the share in the property, which is said to be of Undivided Hindu Family and the dispute is amongst the brothers who are sons of erstwhile Jagirdar of Badi Sadri. In the written statement, defendant No.1 Himmat Singh has denied the averments made in the plaint and stated that he being the eldest son was entitled to inherit to the property and it was not liable to be partitioned. It is relevant to mention here that the father of the plaintiff died in the year 1944 and at the time his sons were minor. Several averments have

been made in the plaint as well as in the written statement making mention about the customs etc prevailing in the State regarding entitlement of the elder son in the property. Thus, Issue No.2 decided by the learned trial Court holding that suit was not triable by it in view of Sec.46 of the Act is not correct interpretation of Sec.46.

As discussed above, it appears that Sec.46 of the Act of 1952 in relation to the lands, which were in possession of the tillers at the time of resumption of the jagirs, was framed to make proper arrangements in relation to those lands. Sec. 9, 21 & 23 of the Act make the position absolute clear as to in what circumstances and in what manner right shall accrue in favour of the actual tiller of the land.

In view of above provisions to say that since Sec.46 of the Act creates a bar in relation to the matters covered under the Jagir

Act, therefore, to presume that all matters whether connected or not connected with the Jagir Act shall also be covered with the help of Sec.46 of the Act, cannot be said to be a correct interpretation of law. Infact, in the present case, the trial Court was required to decide the matter only after recording evidence.

A perusal of Issue No.1 & 2 framed by the learned trial Court clearly indicates that in the present matter in relation to averments made in the plaint, the parties were required to lead evidence. The parties were also required to lead evidence in relation to customs etc. Thus, in my humble opinion, in the present case issues framed were mixed question of law and facts. Therefore, by giving history in the case of the erstwhile State etc. and without properly taking care of the provisions contained in the Act of 1952 in a cursory manner the trial Court has disposed of Issue No.2 holding that the suit was not

triable.

A specific query was put to the learned counsel for the respondent in relation to ouster of the jurisdiction of the civil Court taking into consideration Sec.46 of the Act. The learned counsel for the respondent contended that the trial Court has correctly appreciated the matter which requires no interference but as regards the applicability of Sec.46 of the Act of 1952, the learned counsel could not point out any of the provisions of the Act of 1952 to show that in the present facts and circumstances of the case Sec.46 of the Act of 1952 was applicable.

The learned trial Court, though has discussed the matter in detail but in my considered opinion, the crux of the matter was as to whether in view of Sec.46 of the Act the suit was not maintainable?

In view of discussions made above,

[26]

there remains no doubt in mind of the Court that issues framed by the Court were mixed questions of law and fact and it was in the interest of justice and in the fitness of things to have decided the matter after recording evidence in the matter.

In view of above, my answer to Point No.1 is that learned trial Court committed grave illegality in deciding Issue No.2 and in consequence thereto the appeal of the appellant deserves to be accepted and the case requires to be remitted for recording evidence and thereafter to decide the matter in accordance with law.

The learned counsel for the respondents at this stage submitted for a direction to the trial Court to dispose of the matter expeditiously. The prayer made by the learned counsel for the respondent appears to be reasonable.

[27]

In the result, the appeal is allowed and the judgment and decree passed by the court below is set aside and the case is remitted back to the trial Court to decide the matter afresh in accordance with law preferably within a period of 6 months from receipt of the record. However, the observations made shall not come in the way of trial Court while deciding the matter on the basis of evidence recorded and the trial Court shall be free to decide the matter on the basis of material brought before it.

The parties are required to present themselves before the trial Court on 17th April 2006.

The record of the case be returned forthwith.

(SATYA PRAKASH PATHAK) J.

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In this connection, reference may be made to State of Rajasthan Vs. 1964 RLW wherein it has been observed that Jagirdar is not divested of his property as he file a lists of properties. In Kishan Singh Vs. Bheron Singh RLW 443....it has been held therein that failure to file list does not divest the Jagirdar of his private property. In Bheru Pratap Vs. 1964 RLW83 it has been clearly observed that Jagir Commission is not a Civil Court under the Code of Civil Procedure, he was just like a person and not a Court though it was required to act in quasi judicial manner.